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BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D. C.

Joint Application of AMERICAN AIRLINES, INC. and EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC., SIMMONS AIRLINES, INC., and WINGS WEST AIRLINES, INC. (d/b/a AMERICAN EAGLE) and CANADIAN AIRLINES INTERNATIONAL LTD. and ONTARIO EXPRESS LTD. and TIME AIR INC. (d/b/a CANADIAN REGIONAL) and INTER-CANADIEN (1991) INC. under 49 USC 41308 and 41309 for approval of and antitrust immunity for commercial alliance agreement	OST-95-792 – 40

JOINT ANSWER OF AMERICAN AIRLINES, et al.
AND CANADIAN AIRLINES INTERNATIONAL LTD.
et al. TO PETITION OF UNITED AIR LINES, INC.
FOR RECONSIDERATION OF ORDER 96-7-21

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August 15, 1996

BEFORE THE

DEPARTMENT OF TRANSPORTATION

WASHINGTON, D. C.

Joint Application of AMERICAN AIRLINES, INC. and EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC., SIMMONS AIRLINES, INC., and WINGS WEST AIRLINES, INC. (d/b/a AMERICAN EAGLE) and CANADIAN AIRLINES INTERNATIONAL LTD. and ONTARIO EXPRESS LTD. and TIME AIR INC. (d/b/a CANADIAN REGIONAL) and INTER-CANADIEN (1991) INC. under 49 USC 41308 and 41309 for approval of and antitrust immunity for commercial alliance agreement	:	OST-95-792

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FOR RECONSIDERATION OF ORDER 96-7-21

American Airlines, Inc. and its regional affiliates, and Canadian Airlines International Ltd. and its regional affiliates, pursuant to 14 CFR 302.37, hereby answer the petition filed by United Air Lines, Inc. on August 5, 1996 for reconsideration of Order 96-7-21, July 15, 1996. The subject order granted final approval of and antitrust immunity for a commercial alliance agreement between American and Canadian.

United's petition for reconsideration is without merit and should be denied. United contends that under Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) and its progeny, it is entitled to simultaneous consideration of its application for immunity with Air Canada, now pending in OST-96-1434. But as the Department thoroughly explained in Order 96-7-21 (pp. 13-15), United's position is fatally deficient because (1) United failed to seek simultaneous consideration by filing a timely application, and (2) United failed to establish that the two applications are mutually exclusive.

Regarding point one, how could the Department conceivably find the United/Air Canada application, filed on June 4, 1996 and not perfected until June 26, 1996,[1] appropriate for "simultaneous" consideration with the American/Canadian application, filed more than seven months previously on November 3, 1995? If the Department were to follow United's illogic, opposing parties could seek to delay a competitor's application indefinitely simply by objecting on the merits (as United did here), and then reverse course by filing "competing" applications when their opposition fails, claiming a "right" to simultaneous consideration even after a show-cause order has been issued for the initial application (as occurred here). It

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[1]See Order 96-7-16, July 12, 1996.

would be highly unfair and prejudicial to applicants, contrary to the public interest in timely decision-making, and at odds with fundamental principles of orderly administrative procedures for the Department to accede to United's extreme position.

Indeed, if United's ill-conceived notion of "simultaneous" consideration were to be adopted, the Department would be hamstrung in ever finalizing its decisions in any immunity proceeding, since another applicant would be free to appear following issuance of a show-cause order and argue that its late filing should be "simultaneously" heard as well. Applying United's theory, the Department should defer processing the United/SAS immunity application (OST-96-1411) until it can simultaneously consider the American/British Airways application, even though such an application has not yet been submitted.

As the Department found in Order 96-7-21, "[t]he due process requirements of Ashbacker do not demand that we defer a final decision in this case, in order to consider an application that was filed much later" (p. 14). United's petition for reconsideration provides no basis for the Department to disturb that common-sense conclusion.

Regarding United's second point, that the American/Canadian and United/Air Canada applications may be mutually exclusive, the Department fully addressed this matter in Order 96-7-21, and found no merit to United's theory:

> "Since we have no policy of limiting the number of immunized alliances, this proceeding is not analogous to the types of proceedings where courts required contemporaneous consideration of mutually-exclusive licenses. Indeed, no party has cited any precedent where an agency was required to combine its consideration of one acquisition or joint-venture proposal with a second such proposal merely because the approval of one would change the market structure in ways that could make more likely the potential disapproval of the second acquisition or joint-venture proposal" (p. 14).

United's citation to Kodiak Airways v. CAB, 447 F.2d 341 (1971), is simply inapt. Kodiak stands for the principle that an agency may not properly allow a pendente lite award to influence the outcome of a subsequent proceeding for permanent authority. We fail to understand how that decision has any relevance here.

We also note that United's other "precedents" not only fail to support its position, but in fact support the Department. In PUC v. FERC, 900 F.2d 269 (D.C. Cir. 1990), the Court firmly rejected Ashbacker claims, where the petitioners had chosen the "traditional route" under the agency's rules for processing their application, unlike the winning company which submitted its application under the agency's "fast track"

rules. In finding that these applicants were not "similarly situated" under Ashbacker, the Court said that if the petitioners' position were accepted, "the [Optional Expedited Certificate] procedures would be undone -- at least in any case where a competitor chose to undo them. Indeed, such a principle would destroy any agency's decision to streamline adjudicatory procedures.... [I]f the tortoises are entitled to engulf the hares in their proceedings, they can destroy the fast track's speed and thus its existence as a fast track" (900 F.2d at 278). Applying that ruling here, United is the dilatory tortoise, and its attempt to stymie the Department's procedures should similarly be rejected.

Equally inapt is Cheney Railroad Co. v. ICC, 902 F.2d 66, 69 (D.C. Cir. 1990). There, the Court did not even rely on Ashbacker, stating that "[w]e have no reason to evaluate the Commission's alternative idea -- that simultaneous assessment is required by...Ashbacker" (902 F.2d at 69). In upholding the ICC's decision to accord simultaneous consideration, the Court cited the ICC's rules, "which close the window on competing applications 30 days after an initial application is received" (id.). Here, United filed its application nearly 200 days following American's, long after the window had closed on any remotely arguable notion of simultaneous consideration.

The United/Air Canada application should be processed by the Department in due course, and without reopening the final decision in the American/Canadian proceeding. United's petition for reconsideration of Order 96-7-21 should be denied.

Respectfully submitted,

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August 15, 1996

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